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No. 05-

In the Supreme Court of the United States

TROY KING, DAVID W. MÁRQUEZ, TERRY GODDARD, BILL LOCKYER, JOHN SUTHERS, CARL DANBERG, THURBERT E. BAKER, LAWRENCE WASDEN, LISA MADIGAN, STEVE CARTER, THOMAS J. MILLER, PHILL KLINE, GREGORY D. STUMBO, CHARLES C. FOTI, JR., G. STEVEN ROWE, J. JOSEPH CURRAN, JR., THOMAS F. REILLY, MIKE COX, JEREMIAH W. NIXON, MICHAEL MCGRATH, JON BRUNING, ROY COOPER, JIM PETRO, HARDY MYERS, HENRY MCMASTER, LARRY LONG, PAUL G. SUMMERS, ROB MCKENNA, PEG LAUTENSCHLAGER, AND PATRICK CRANK, IN THEIR OFFICIAL CAPACITIES AS ATTORNEYS GENERAL OF ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WASHINGTON, WISCONSIN, AND WYOMING, RESPECTIVELY, PETITIONERS,

v.

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., NATIONWIDE TOBACCO, INC., AND 3B HOLDINGS, INC., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
MICHAEL SCODRO
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

Counsel for Petitioners

QUESTION PRESENTED

Whether principles of due process and state sovereignty permit a court in one State to exercise personal jurisdiction over the Attorney General of another State in a suit brought to invalidate and enjoin enforcement of laws enacted and enforced entirely within the latter State.

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PETITION FOR A WRIT OF CERTIORARI

Troy King, David W. Márquez, Terry Goddard, Bill Lockyer, John Suthers, Carl Danberg, Thurbert E. Baker, Lawrence Wasden, Lisa Madigan, Steve Carter, Thomas J. Miller, Phill Kline, Gregory D. Stumbo, Charles C. Foti, Jr., G. Steven Rowe, J. Joseph Curran, Jr., Thomas F. Reilly, Mike Cox, Jeremiah W. Nixon, Michael McGrath, Jon Bruning, Roy Cooper, Jim Petro, Hardy Myers, Henry McMaster, Larry Long, Paul G. Summers, Rob McKenna, Peg Lautenschlager, and Patrick Crank,[1] in their official capacities as, respectively, Attorneys General of Alabama, Alaska, Arizona, California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-28a) is reported at 425 F.3d 158 (2005), and the order of that court

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[1] Pursuant to this Court's Rule 35.3, Troy King, David W. Márquez, Terry Goddard, John Suthers, Carl Danberg, Lawrence Wasden, Lisa Madigan, Phill Kline, Gregory D. Stumbo, Charles Foti, Mike Cox, Jon Bruning, Jim Petro, Henry McMaster, Larry Long, Rob McKenna, Peg Lautenschlager, and Patrick Crank are automatically substituted for, respectively, William Pryor, Bruce M. Botelho, Janet Napolitano, Ken Salazar, M. Jane Brady, Allan G. Lance, Jim Ryan, Carla J. Stovall, Albert Benjamin Chandler, III, Richard P. Ieyoub, Jennifer Granholm, Don Stenberg, Betty D. Montgomery, Charles Condon, Mark Barnett, Christine O. Gregoire, James E. Doyle, and Hoke Macmillan.

denying rehearing and rehearing en banc (App. 1a) is unreported. The opinions of the district court are unreported, but are available electronically at 2003 WL 22232974 (Sept. 29, 2003) (App. 43a-72a), 2004 WL 1594869 (July 15, 2004) (App. 35a-42a), and 2004 WL 2480433 (Nov. 3, 2004) (App. 29a-34a).

JURISDICTION

The court of appeals entered judgment on September 28, 2005, and denied petitioners' timely petition for rehearing on January 3, 2006. On March 27, 2006, Justice Ginsburg extended until April 18, 2006, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT

Respondent tobacco companies brought suit in New York federal court against petitioners, the Attorneys General of thirty other States, seeking to enjoin their enforcement of tobacco-related laws enacted by their respective States. Even though each State's laws reach only in-state cigarette sales, the Second Circuit held that petitioners were subject to personal jurisdiction in a New York court. The Second Circuit predicated jurisdiction on the ground that the Attorneys General or their agents allegedly "assemble[d] purposefully in New York" and agreed while there to "pass" the challenged statutes. App. 13a.

The Second Circuit's judgment violates principles of state sovereignty and due process by treating a State's most sovereign act — the passage of legislation — as though it were the culmination of a commercial antitrust conspiracy. This Court

should grant certiorari to affirm that state legislation is enacted by state legislatures sitting in state capitals, that any effort to locate the site of state legislation elsewhere, on the basis of pre-legislative activity by individual state officials, demeans state sovereignty, and that the exercise of personal jurisdiction over state Attorneys General based upon such pre-legislative activity cannot be reconciled with due process.

1. Between 1994 and 1998, many States sued numerous tobacco companies to recover costs incurred by the States in treating smoking-related illnesses. Over the course of five months in 1998, settlement discussions with the four largest tobacco companies took place in New York. The negotiations resulted in the Master Settlement Agreement ("MSA") (http://www.naag.org/backpages/naag/tobacco/msa), which was signed by the chief legal officers of 46 States ("Settling States"), and which resolved the pending lawsuits against those four companies and released them from future suits by the Settling States arising out of cigarette sales. App. 4a.

The MSA included provisions authorizing other tobacco companies to join the MSA. See MSA, §§ II(tt), XIII(aa). Respondents, three smaller tobacco companies, declined to join and, like other tobacco companies that did not join, are known as nonparticipating manufacturers ("NPMs"). App. 4a-5a.

Between 1999 and 2001, each of the Settling States enacted an "Escrow Statute," which requires NPMs either to join the MSA or to escrow funds based on the number of cigarettes they sell within that State. See, *e.g.*, 30 ILCS 168/1 *et seq.* (Illinois Tobacco Product Manufacturers' Escrow Act). The Escrow Statutes, which are substantially identical to model legislation included as an appendix to the MSA (see MSA, Exh. T), are intended to ensure that funds are available to satisfy future damage awards in cigarette-related litigation against the NPMs. App. 5a-6a.

Between 2001 and 2005, virtually all of the Settling States enacted a "Certification Statute," which requires NPMs to attest periodically to their compliance with that State's Escrow Statute. See, *e.g.*, 30 ILCS 167/1 *et seq.* (Illinois Tobacco Products Manufacturers' Escrow Enforcement Act). Unlike the Escrow Statutes, the Certification Statutes are not based on model legislation in the MSA.

2. Respondents brought suit in New York federal court against petitioners (and the Attorney General of New York) in their official capacities. The suit alleged that each State's Escrow and Certification Statutes violate, among other things, Section 1 of the Sherman Act and the "dormant" Commerce Clause, App. 6a-7a, and sought declaratory relief and an injunction prohibiting the Attorneys General from enforcing the Statutes in their respective States.

3. The district court dismissed the claims against petitioners for lack of personal jurisdiction. App. 46a-54a. Of the various alleged connections between petitioners and New York, the court noted that the "only legitimate" ground supporting jurisdiction was the allegation that the MSA was negotiated in New York. App. 52a. That contact was insufficient, the court concluded, because the negotiations "were not part of an attempt to formulate a business or commercial contract, as has traditionally been the situation in the case law that has found New York negotiations sufficient to confer personal jurisdiction over non-domiciliaries." App. 53a. The court explained:

> At no point did [petitioners] attempt to avail themselves of the protections of New York law. * * * Their presence in New York was purely coincidental. The negotiations could easily have been held anywhere, the fact that the negotiations took place in New York was entirely fortuitous.

Ibid. (internal quotations omitted). Because the Attorney General of New York did not contest personal jurisdiction, the district court found it necessary to address respondents' claims on the merits, and concluded that the complaint failed to state a claim on which relief could be granted. App. 60a-72a.

Respondents moved for reconsideration. With respect to personal jurisdiction, the court rejected respondents' argument that it had jurisdiction over petitioners because they allegedly engaged in tortious conduct in New York:

> Plaintiffs make clear in their Complaint * * * and their papers in opposition to the Motion to Dismiss for Lack of Personal Jurisdiction * * * that their claims are aimed at the Escrow and [Certification] Statutes, not the MSA itself. These Statutes were enacted by the individual states through their individual legislatures. The Statutes were not enacted in New York. Furthermore, the defendants are named in their individual capacities on the notion that they are the ones attempting to enforce the Statutes in their respective states. Any tortious conduct was, therefore, committed in the various states.

App. 40a. With respect to the merits, the district court reinstated respondents' antitrust claim against the Attorney General of New York. App. 37a-39a.

4. The district court entered final judgment under Fed. R. Civ. P. 54(b), App. 29a-34a, and respondents appealed. To support the district court's jurisdictional holding, petitioners invoked principles of state sovereignty, arguing that "[a] federal court in New York has no interest in adjudicating" the validity of other States' laws, and that "for it to do so would violate the foreign states' sovereign rights." Def. C.A. Br. 29-30, citing *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1190 n.8 (C.D. Cal. 2000) (holding, in lawsuit challenging several States'

Escrow and Certification Statutes, that subjecting States other than California "to California jurisdiction" would "constitut[e] an extreme impingement on state sovereignty"). The Second Circuit disagreed, saying that it saw "no reason why the negotiation and execution of the [MSA] should be viewed any differently than an ordinary commercial contract." App. 12a. Applying precedent allowing personal jurisdiction over parties to commercial contracts negotiated and executed in New York, the court of appeals concluded that petitioners were subject to suit in New York because they or their agents allegedly "agree[d]" while in New York to "pass" the Escrow and Certification Statutes. App. 13a.[2]

On the merits, the Second Circuit affirmed the district court's dismissal of the non-antitrust claims, with the exception of the claim that the Escrow and Certification Statutes violate the "dormant" Commerce Clause. App. 14a-28a.

5. Petitioners sought rehearing and rehearing en banc. As in their merits brief, petitioners maintained that it would denigrate state sovereignty for a New York court to exercise personal jurisdiction over them in a lawsuit brought to enjoin them from enforcing their own States' laws with respect to in-state sales transactions. Def. C.A. Pet. Reh'g 9-12. The Second Circuit denied rehearing without comment. App. 1a.

REASONS FOR GRANTING THE PETITION

The question presented here is whether principles of due process and state sovereignty permit a court in one State to exercise personal jurisdiction over the Attorney General (or

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[2] On review of the district court's judgment granting petitioner's motion to dismiss, the Second Circuit was required to accept as true the complaint's allegations regarding petitioners' activities in New York. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

other official) of another State in a lawsuit challenging laws enacted and enforced entirely within the latter State. That question is exceptionally important to the States and to the fair and efficient operation of the interstate judicial system. The Second Circuit's ruling — that personal jurisdiction may be exercised under those circumstances — upsets the delicate relationship between the States and the federal courts and warrants this Court's review.

A comparable issue regarding personal jurisdiction over out-of-state officials was presented and reserved in *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). The plaintiff corporation (Great Western) brought suit in Texas federal court to enjoin the Attorney General of Idaho from enforcing the Idaho corporate takeover statute to block the plaintiff's acquisition of a publicly traded company with substantial assets in Idaho. *Id.* at 175-177. The district court declined to dismiss the Attorney General for lack of personal jurisdiction, and a divided court of appeals affirmed. *Id.* at 177-179. Central to the majority's ruling was the fact that the Idaho statute would reach transactions not only in Idaho, but in Texas and throughout the Nation:

> Idaho's statute seeks to regulate the sale of a security even when neither the buyer nor the seller nor the sale itself has any connection with Idaho. The Idaho officials deliberately cast their regulatory net across the United States. They knew these regulations would entangle transactions with no connection to Idaho.

Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1269 (5th Cir. 1978) (internal citations omitted). The majority concluded that "this extraterritorial regulation provides the necessary contacts with Texas" to support the Texas court's exercise of personal jurisdiction. *Id.* at 1270.

On review before this Court, the parties and their *amici* devoted substantial attention to whether personal jurisdiction lay over the Attorney General of Idaho. The Court, however, disposed of the case on venue grounds without reaching jurisdiction. *Leroy*, 443 U.S. at 180. To justify its "revers[al] of the normal order of considering personal jurisdiction [before] venue," the Court explained that resolution of the jurisdictional issue "would require the Court to decide a question of constitutional law it has not heretofore decided," and accordingly left the issue for another day. *Id.* at 181.

That day has come, albeit in a context where the exercise of personal jurisdiction is far less defensible than it was in *Leroy*. As the Fifth Circuit noted in *Leroy*, Great Western had a plausible claim that the Idaho statute would apply extraterritorially to transactions in Texas and elsewhere. 577 F.2d at 1269-1270. Here, by contrast, each State's Escrow and Certification Statutes reach only cigarette sales transactions within that particular State. See, *e.g.*, 30 ILCS 168/15(a) (Illinois Escrow Statute) (imposing obligations upon "[a]ny tobacco product manufacturer selling cigarettes to consumers within the State of Illinois"), 168/15(a)(2)(B)(ii) (referring to "the amount [an NPM] was required to place into escrow on account of units sold in the State"); 30 ILCS 167/15(a) (Illinois Certification Statute) (imposing obligations upon "[e]very tobacco product manufacturer whose cigarettes are sold in this State"), 167/15(a)(3)(F) (requiring each NPM to certify "the amount the [NPM] placed in the fund for cigarettes sold in the State during the preceding calendar year"); see also App. 5a (noting that Escrow Statutes require NPMs to "establish and fund an escrow or reserve account in an amount determined by the manufacturer's sales volume in the state"); *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 356 (4th Cir.) (explaining that the Virginia Escrow Statute "imposes a fee only for cigarettes actually sold within the State" and "has no effect on

transactions undertaken by out-of-state distributors in other States"), *cert. denied*, 537 U.S. 818 (2002).

Thus, in holding that a New York court could exercise personal jurisdiction over thirty foreign state Attorneys General to enjoin their enforcement of state laws that do not operate extraterritorially, the Second Circuit went far beyond what the Fifth Circuit countenanced in *Leroy*. If the Texas district court's exercise of jurisdiction in *Leroy* was problematic enough to warrant this Court's invocation of the principle of constitutional avoidance, the New York court's exercise of jurisdiction here crosses well over the constitutional boundary. This is so not only because this matter presents a far weaker case for federal jurisdiction than did *Leroy*, but also because of this Court's increasing recognition in the quarter century since *Leroy* of the limits that federalism and state sovereignty place upon federal court jurisdiction over States and their officials.

A. Federalism and state sovereignty are an essential part of the constraints that due process imposes upon personal jurisdiction. Those constraints do more than "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum"; they also "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). "The sovereignty of each State * * * implie[s] a limitation on the sovereignty of all of its sister States — a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 293. Accordingly, "the reasonableness of asserting jurisdiction over [a] defendant must be assessed 'in the context of our federal system of government.'" *Ibid.* In that way, due process "act[s] as an instrument of interstate federalism." *Id.* at 294.

Taking "our federal system of government" into account for jurisdictional purposes means, if nothing else, that a court asked

to exercise jurisdiction over challenges to state legislation must treat the enacting State as a sovereign entity, not a loose confederation of individual actors. A court therefore must treat the site of state legislation as the place of enactment, not some out-of-state location where the State's executive branch officials discussed plans to encourage their State's legislature to pass that legislation.

The district court recognized these fundamental principles, characterizing the Escrow and Certification Statutes as the products of "individual states [acting] through their individual legislatures" in their respective state capitals. App. 40a. The Second Circuit, by contrast, treated the State's enactment of legislation — its most sovereign act — as merely the last facet of a multi-staged scheme that commenced with the MSA negotiations in New York. Consistent with this view, the court of appeals held that a New York court could exercise jurisdiction over thirty foreign state Attorneys General because they or their agents allegedly assembled in New York and there "agree[d]" to "pass individual state statutes." App. 13a.

The Second Circuit's rationale conflates separately accountable branches of state government and disregards the independent legislative function, and in so doing demeans basic notions of state sovereignty. State Attorneys General do not have legislative power; only state legislatures do. Compare, *e.g.*, Ill. Const., art. IV, § 1 ("The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives * * * * "), with Ill. Const., art. V, § 15 ("The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law"). It necessarily follows that a meeting of state Attorneys General cannot possibly result in an "agreement" to enact state laws. It also follows that the Escrow and Certification Statutes were conceived not in New York City, but in the capitals of petitioners' thirty States. See, *e.g.*, 5 ILCS 190/1 ("the site of

government shall continue to be at Springfield, in the County of Sangamon, at which place all acts shall be done which are required to be done at the seat of government"). This is doubly so with respect to the Certification Statutes, where were not even addressed in the MSA.

The Second Circuit's decision, in both result and rationale, conflicts with *PTI, Inc. v. Philip Morris Inc.*, *supra*. The plaintiff tobacco companies in *PTI*, like respondents here, sued foreign state Attorneys General to enjoin their enforcement of their respective States' Escrow Statutes. 100 F. Supp. 2d at 1187. The court dismissed the claims against the foreign Attorneys General for lack of personal jurisdiction, citing "[t]he conflict with state sovereignty" as "perhaps the most compelling factor," and cautioning that "requiring the states to submit to California jurisdiction [would] constitute[] an extreme impingement on state sovereignty." *Id.* at 1189 n.8. The court explained that while "California [would have] an interest in determining the legitimacy of * * * California's [MSA-related laws]," other "states have a strong interest in having their own courts determine the legitimacy of [their own] legislation." *Ibid.*

B. In addition to incorporating principles of federalism and state sovereignty, due process requires a court to consider the "'quality and nature' of [a] defendant's activity" in deciding whether to exercise personal jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). The Second Circuit disregarded the "quality and nature" of petitioners' conduct, and did so in a way that further demeans state sovereignty.

The Second Circuit's ruling rests on the premise that "the negotiation and execution of the Master Settlement Agreement" should not be "viewed any differently than an ordinary commercial contract." App. 12a. That premise is flawed in two significant respects. As an initial matter, respondents' lawsuit challenges the validity of the Escrow and Certification Statutes,

not the MSA. See Complaint, ¶¶ 111-150 (Counts I-VI) (alleging that Escrow and Certification Statutes violate Due Process Clause, Commerce Clause, First Amendment, Cigarette Labeling and Advertising Act, Sherman Act, and 42 U.S.C. § 1983). Likewise, while respondents' prayer for relief seeks a declaration that the Escrow and Certification Statutes are unlawful and an injunction against their enforcement, it does not seek *any* declaratory or injunctive relief with respect to the MSA. See *id.*, page 42. As the district court noted, respondents "ma[d]e clear in their Complaint and their papers in opposition to the Motion to Dismiss for Lack of Personal Jurisdiction that their claims are aimed at the Escrow and Contraband Statutes, not the MSA itself." App. 40a (internal citations omitted). Accordingly, the negotiation and execution of the MSA has no bearing on the jurisdictional inquiry.

In any event, the MSA is not and should not be treated like an "ordinary commercial contract." The MSA is the culmination of efforts by petitioners' thirty States, together with sixteen other States, "to further [their] policies regarding public health, including policies adopted to achieve a significant reduction in smoking by Youth." MSA, Section I, Recital 2. The expectation was that the MSA would "achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, * * * as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth." *Id.*, Recital 7.

Far from being an ordinary commercial contract, the MSA establishes a complex regulatory solution to a most serious public health problem. As this Court has observed, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 161 (2000). The MSA combats that threat by requiring

signatory tobacco companies "to take steps aimed at reducing or eliminating tobacco use by minors and educating the public at large about the dangers of tobacco use." *Cardenas v. Anzai*, 311 F.3d 929, 932 (9th Cir. 2002). Among other things, the MSA obligates the companies:

> (1) to refrain from targeting youth in the advertising and marketing of tobacco products; (2) to refrain from using cartoon characters to promote cigarette sales; (3) to limit tobacco brand-name sponsorships of athletic and other events; (4) to refrain from lobbying Congress to preempt or diminish the States' rights under the [MSA] or to advocate that settlement proceeds under the [MSA] be used for programs other than those related to tobacco or health; (5) to dissolve the Tobacco Institute, the Council for Tobacco Research, and the Center for Indoor Air Research; and (6) to refrain from suppressing research relating to smoking and health and misrepresenting the dangers of using tobacco products.

Star Scientific, 278 F.3d at 345. The Second Circuit's reduction of the MSA to a "commercial" act, and its treatment of petitioners as ordinary private antitrust defendants, badly misunderstands the nature and quality of petitioners' activities on behalf of their States, and denigrates the States' status as co-equal sovereigns in our federal system. Cf. *Kulko*, 436 U.S. at 101 (distinguishing between defendant's conduct and "commercial act[s]" in rejecting personal jurisdiction).

C. Allowing a New York court to exercise jurisdiction over petitioners also threatens "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," *World-Wide Volkswagen Corp.*, 444 U.S. at 292; see also *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 113 (1987), another consideration ignored by the Second Circuit. To date, several federal courts have rejected challenges to Escrow and Certification Statutes enacted by the

States in which they sit.[3] The Second Circuit's decision permits

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[3] See *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003) (affirming dismissal of antitrust challenge to Pennsylvania Escrow statute on the merits and Commerce Clause challenge for lack of standing), *cert. denied*, 540 U.S. 1179 (2004); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir.) (affirming dismissal of due process, equal protection and Commerce Clause challenges to Virginia Escrow Statute), *cert. denied*, 537 U.S. 818 (2002); *Grand River Enters. Six Nations, Ltd. v. Beebe*, 2006 WL 547919 (W.D. Ark. Mar. 6, 2006) (dismissing antitrust, First Amendment, due process and equal protection challenges to Arkansas Escrow Statute); *International Tobacco Partners, Ltd. v. Beebe*, ___ F. Supp. 2d ___, 2006 WL 547926 (W.D. Ark. Mar. 6, 2006) (same); *Dos Santos, S.A. v. Beebe*, ___ F. Supp. 2d ___, 2006 WL 547922 (W.D. Ark. Mar. 6, 2006) (same); *Xcaliber Int'l Ltd. v. Kline*, ___ F. Supp. 2d ___, 2006 WL 288705 (D. Kan. Feb. 7, 2006) (granting summary judgment against antitrust and procedural due process challenges to amendment to Kansas Escrow Statute), *appeal docketed*, No. 06-3061 (10th Cir.); *Tritent Int'l Corp. v. Kentucky*, 2005 WL 3766971 (E.D. Ky. Sept. 8, 2005) (dismissing antitrust challenge to Kentucky Escrow Statute), *reconsideration denied*, 395 F. Supp. 2d 521 (E.D. Ky. 2005), *appeal docketed*, No. 05-6791 (6th Cir.); *S&M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604 (M.D. Tenn. 2005) (dismissing antitrust, due process and equal protection challenges to Tennessee Escrow Statute), *appeal docketed*, No. 06-5148 (6th Cir.); *Sanders v. Lockyer*, 365 F. Supp. 2d 1093 (N.D. Cal. 2005) (dismissing antitrust challenge to California Escrow and Certification Statutes), *appeal docketed*, No. 05-15676 (9th Cir.); *Xcaliber Int'l Ltd. v. Edmondson*, 2005 WL 3766933 (N.D. Okla. Aug. 31, 2005) (denying reconsideration of order granting summary judgment against antitrust challenge to amendment to Oklahoma Escrow Statute), *appeal docketed*, No. 05-5178 (10th Cir.); *Star Scientific, Inc. v. Carter*, 2001 WL 1112673 (S.D. Ind. Aug. 20, 2001) (dismissing Commerce Clause challenge to Indiana Escrow Statute); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000) (dismissing antitrust, bill of attainder, Commerce Clause, equal protection and due process challenges to California Escrow Statute).

successive plaintiffs — unhappy with a prior judgment, entered against other tobacco companies, upholding a particular State's Escrow or Certification Statute — multiple bites at the apple in other forums. This is hardly an efficient way to resolve the validity of MSA-related laws. Moreover, so long as the Second Circuit's decision stands, petitioners will be denied the certainty and finality that ordinarily results from decisions rendered by federal courts (particularly federal courts of appeals) in their respective States.

D. Another component of the jurisdictional inquiry is whether New York has an interest in resolving challenges to the validity of other States' Escrow and Certification Statutes. See *World-Wide Volkswagen Corp.*, 444 U.S. at 292. As noted above, the Statutes do not operate extraterritorially; they govern only in-state sales transactions. See pages 8-9, *supra*. Although a New York court certainly has an interest in determining the legitimacy of New York's Statutes, it "has little interest in adjudicating disputes over other states' statutes." *PTI*, 100 F. Supp. 2d at 1190 n.8; see also *Asahi Metal*, 480 U.S. at 114 (finding only "slight" forum state interest in suit). At the same time, petitioners' thirty States have a substantial interest, rooted in their status as sovereigns, in not having an out-of-state court evaluate the validity of laws that govern only in-state conduct. Cf. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1986) ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued") (emphasis in original).

E. The interlocutory posture of this case does not foreclose or weigh against a grant of certiorari. This Court has not hesitated to review an interlocutory decision from a federal court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893); see also Robert L. Stern et al., *Supreme*

Court Practice 258-260 (8th ed. 2002). Review of such decisions has been granted in innumerable cases, including those presenting questions concerning the interplay between state sovereignty and federal jurisdiction. See, *e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 514-515 (2004); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 445 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2003); *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). Because the Second Circuit's ruling implicates such questions, the appropriate course is to end the wrongful exercise of jurisdiction as soon as possible, not to subject thirty Attorneys General to the indignity of defending this case through trial in a New York district court and appeal in the Second Circuit.

Moreover, although this case does not present a conflict among federal courts of appeals and/or state courts of last resort, it has several other features warranting this Court's review. First, the Second Circuit's ruling definitively resolves a matter expressly reserved in *Leroy*. See Stern, *supra*, at 234-235 ("certiorari has been granted where the court of appeals decision is based upon a point expressly reserved or left undecided in prior Supreme Court opinions") (citing cases). Second, the petition presents an important question involving "the jurisdiction of federal district courts," *id.* at 253 — and not just *any* jurisdictional question, but one brought by thirty Attorneys General who, having been sued in their official capacity only, are litigation proxies for the sovereign States they serve. See *id.* at 249 ("an important question * * * affecting * * * a state * * * can warrant review by certiorari").[4]

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[4] The conflict between the Second Circuit and the district court in *PTI* also weighs in favor of certiorari, as this Court has granted review where, as here, a court of appeals renders a decision that conflicts with a district court decision on an important issue concerning state sovereignty. See *Massachusetts v. United States*,

Finally, the Second Circuit's ruling, by its very nature, likely will preclude this question from arising in another court of appeals. Now that the Second Circuit has declared the Southern District of New York open for business for lawsuits seeking to enjoin foreign Attorneys General from enforcing their respective State's Certification and Escrow Statutes, there will be no reason to bring such actions anywhere else. Cf. *Cutting Edge Enters., Inc. v. The National Association of Attorneys General*, No. 06 CV 667 (S.D.N.Y.) (amended complaint filed Mar. 31, 2006) (suit brought by tobacco company against Attorneys General of 41 States and the District of Columbia to challenge, among other things, States' failure to list company's cigarette brands on their respective Web sites). Tobacco companies selling cigarettes in a State whose Statutes have been upheld by the federal court of appeals with jurisdiction over that State, see *Star Scientific, Inc. v. Beales*, *supra*, 278 F.3d 339 (4th Cir. 2002) (Virginia), can avoid the precedential effect of the decision by filing suit in New York. Likewise, companies selling cigarettes in a State whose Statutes have been upheld by a federal district court in that State and are currently on appeal, see, *e.g.*, *Sanders v. Lockyer*, 365 F. Supp. 2d 1093 (N.D. Cal. 2005), *appeal docketed*, No. 05-15676 (9th Cir.), can hedge their bets by suing in New York, which they may perceive to be a more hospitable forum. Compare *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 226-233 (2d Cir.) (reversing dismissal of antitrust claim against New York Certification Statute), *reh'g denied*, 363 F.3d 149 (2d Cir. 2004), with *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003) (affirming dismissal of antitrust claim against Pennsylvania Escrow Statute), *cert. denied*, 540 U.S. 1179 (2004). Because no sensible tobacco company, given the Second Circuit's ruling

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435 U.S. 444, 453 (1978) (certiorari granted to resolve a conflict between a court of appeals and a single-judge district court concerning States' constitutional immunity from a federal tax).

in this case, would sue a non-forum State anywhere but New York, a circuit split on the crucial jurisdictional issue presented here is unlikely to emerge.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
MICHAEL SCODRO
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

APRIL 2006

TROY KING
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130

DAVID W. MÁRQUEZ
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

TERRY GODDARD
Attorney General of Arizona
1275 W. Washington Street
Phoenix, AZ 85007

BILL LOCKYER
Attorney General of California
1300 I Street, Suite 1740
P.O. Box 944255
Sacramento, CA 94244-2550

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street
Denver, CO 80203

CARL C. DANBERG
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334-1300

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-1000

STEVE CARTER
Attorney General of Indiana
IGCS – Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204

TOM MILLER
Attorney General of Iowa
1305 E. Walnut
Des Moines, IA 50319

PHILL KLINE
Attorney General of Kansas
120 S.W. 10th Avenue
Topeka, KS 66612

GREG STUMBO
Attorney General of Kentucky
State Capitol, Room 116
Frankfort, KY 40601

CHARLES FOTI
Attorney General of Louisiana
P.O. Box 94095
Baton Rouge, LA 70804-4095

G. STEVEN ROWE
Attorney General of Maine
State House Station 6
Augusta, ME 04333

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

MIKE COX
Attorney General of Michigan
525 W. Ottawa Street
Lansing, MI 48909

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401

JON BRUNING
Attorney General of Nebraska
State Capitol
P.O. Box 98920
Lincoln, NE 68509-8920

ROY COOPER
Attorney General of North
Carolina
P.O. Box 629
Raleigh, NC 58505-0040

JIM PETRO
Attorney General of Ohio
30 East Broad Street
Columbus, OH 43215

HARDY MYERS
Attorney General of Oregon
1162 Court Street N.E.
Salem, OR 97301

HENRY MCMASTER
Attorney General of South
Carolina
P.O. Box 11549
Columbia, SC 29211-1549

LAWRENCE E. LONG
Attorney General of South
Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501

PAUL SUMMERS
Attorney General of Tennessee
500 Charlotte Avenue
Nashville, TN 37243

ROB MCKENNA
Attorney General of
Washington
900 Fourth Street, Suite 2000
Olympia, WA 98504-0100

PEG LAUTENSCHLAGER
Attorney General of Wisconsin
State Capitol, Suite 114
Madison, WI 53707-7857

PATRICK J. CRANK
Attorney General of Wyoming
123 State Capitol
Cheyenne, WY 82002